

E-FILED on 1/8/10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SADIE LYNN RAISNER ZIMPELMAN,

Plaintiff,

v.

PROGRESSIVE NORTHERN INSURANCE
COMPANY, and DOES 1 through X,
inclusive,

Defendants.

No. C-09-03306 RMW

ORDER GRANTING MOTION TO
TRANSFER VENUE PURSUANT TO 28
U.S.C. § 1404(a)

[Re Docket No. 16]

Defendant Progressive Northern Insurance Company ("Progressive") moves for an order transferring venue to the District of Minnesota. For the reasons set forth below, the court grants the motion.

I. BACKGROUND

On May 26, 2006, plaintiff Sadie Lynn Raisner Zimpelman ("Zimpelman") was injured in an automobile accident in Santa Clara County, California. Compl. ¶ 8. The accident was caused by another driver, Rovilla Chase O' Neal. *Id.* At the time, Zimpelman had an automobile insurance policy with Progressive. Compl. ¶¶ 4, 8. Plaintiff alleges that the accident caused her severe neck and back injuries, resulting in damages that exceed \$1,000,000. Compl. ¶ 9. In August 2007, plaintiff filed a complaint for personal injury against Ms. O' Neal ("Personal Injury Action") and

1 eventually settled for Ms. O' Neal's policy limit of \$100,000. Compl. ¶¶ 10-12. After accepting this
2 settlement amount, plaintiff demanded that Progressive pay her \$250,000, the policy limit for
3 underinsured motorist coverage. Compl. ¶ 14. Progressive has not paid her the \$250,000. Compl. ¶
4 20.

5 On May 4, 2009, Zimpelman filed suit against Progressive in Santa Clara County Superior
6 Court, alleging breach of contract for its failure to pay the \$250,000 underinsured motorist coverage
7 limit. Compl. ¶¶ 17-21. On July 20, 2009, Progressive removed the action to this court based on
8 diversity jurisdiction. Progressive now seeks to transfer venue to the District of Minnesota.

9 II. ANALYSIS

10 28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest
11 of justice, a District Court may transfer any civil action to any other district or division where it
12 might have been brought." Since transfer is limited to courts where the action might have been
13 brought, the transferee court must: (1) be able to exercise personal jurisdiction over the defendant,
14 (2) have subject matter jurisdiction over the claim, and (3) be a proper venue. *Hoffman v. Blaski*,
15 363 U.S. 335, 343-44 (1960). In the present case, the parties do not dispute that the action could
16 have been brought in the District of Minnesota. The court therefore considers whether transferring
17 venue to the District of Minnesota would best serve the convenience of parties, the convenience of
18 witnesses, and the interests of justice. Progressive, as the party moving for the transfer, has the
19 burden of demonstrating that transfer is appropriate. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495,
20 499 (9th Cir. 2000). This burden can be met by a lesser showing of inconvenience than what is
21 required under forum non conveniens because all that is sought is a transfer of venue, not a complete
22 dismissal of the action. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955).

23 A. Convenience of Parties

24 Progressive asserts that transfer to the District of Minnesota would be more convenient for
25 both parties and points to the fact that plaintiff currently resides in Minnesota. Decl. of Timothy
26 Pothen ("Pothen Decl.") ¶ 4. Though plaintiff resides in Minnesota, she filed suit in California,
27 suggesting that she does not find Minnesota to be a more convenient forum. However, plaintiff has
28 not explained why California would be a more convenient forum for her. Though her attorneys are

1 located in California, courts generally do not consider the convenience of counsel to be a relevant
2 factor in considering a motion to transfer venue. *See, e.g., In re Horseshoe Entertainment*, 337 F.3d
3 429, 434 (5th Cir. 2003); *Solomon v. Continental Am. Life Ins. Co.*, 472 F.2d 1043, 1047 (3rd Cir.
4 1973).

5 On the other hand, Progressive – a national company with its principal place of business in
6 Wisconsin – has also failed to explain why litigating this action in California would be inconvenient
7 for Progressive. As the moving party, Progressive has the burden of establishing that transfer is
8 appropriate. *Jones*, 211 F.3d at 499. Thus, this factor does not weigh in favor of transfer.

9 **B. Convenience of Witnesses**

10 The convenience of witnesses has been called the most powerful factor governing the
11 decision to transfer a case. *Florens Container v. Cho Yang Shipping*, 245 F. Supp. 2d 1086, 1092
12 (N.D.Cal. 2002). Progressive contends that all key witnesses are located in Minnesota, such that
13 transfer of this action to Minnesota would greatly serve the convenience of witnesses. These
14 witnesses include: Progressive employees involved in handling the disputed claim, medical
15 providers who treated plaintiff for her alleged injuries, and plaintiff's employer to testify about
16 plaintiff's absence from work. Plaintiff argues that there are important witnesses who reside in
17 California, such as: Ms. O' Neal, the defendant in the Personal Injury Action, and two of the
18 passengers who were in the car with plaintiff during the accident.¹ Progressive claims that the
19 accident itself is not relevant to this action because Progressive is not disputing liability. However,
20 the severity of the accident is a fact likely to be in dispute, making the testimony of witnesses to the
21 accident relevant.

22 Since some witnesses are California residents while others are Minnesota residents, it is
23 inevitable that some witnesses will be inconvenienced, regardless of the choice of forum. When
24 taking into account the number of witnesses affected and the relative importance of their testimony,
25 the court finds that this factor weighs in favor of transfer. There are more witnesses who would be

26 ¹ Plaintiff also states that the emergency physicians and reporting police officer at the accident
27 scene reside in California but does not provide any evidence regarding their current residence or
28 explain how their testimony would be useful. It is unclear whether plaintiff was examined by
emergency physicians at the scene of the accident since the police report states that she declined
medical attention. Ex. B to Decl. of Fred G. Meis.

1 inconvenienced if this action were maintained in California than if it were transferred. More
2 importantly, while the testimony of witnesses to the accident is relevant, the testimony of the
3 medical providers who treated plaintiff for her alleged injuries is likely to be more probative
4 regarding the central issue in this case – the nature and extent of injuries suffered by plaintiff as a
5 result of the accident.

6 **C. Interests of Justice**

7 In considering the interests of justice, courts often look at a variety of specific factors,
8 including: (1) plaintiff's choice of forum and parties' contacts with the chosen forum, (2) the
9 availability of compulsory process to compel attendance of unwilling non-party witnesses, (3) the
10 ease of access to sources of proof, (4) the location where the relevant agreements were negotiated
11 and executed, and (5) the state that is most familiar with the governing law. *Jones*, 211 F.3d at
12 498-99. Having considered these factors, the court finds that the interests of justice are better served
13 by transfer of venue, as set forth below:

14 **1. Plaintiff's Choice of Forum and Parties' Contacts with Chosen Forum**

15 The Northern District of California is plaintiff's choice of forum. However, the weight given
16 to plaintiff's choice of forum diminishes when the plaintiff resides outside the chosen forum. *Gemini*
17 *Capital Group v. Yap Fishing Corp.*, 150 F.3d 1088, 1091 (9th Cir.1998). Since plaintiff resides in
18 Minnesota, this factor does not carry as much weight as it otherwise would. In addition:

19 In judging the weight to be given [to plaintiff's choice of forum] . . . consideration must be
20 given to the extent both of the defendant's business contacts with the chosen forum and of the
21 plaintiff's contacts, including those relating to [plaintiff's] cause of action. If the operative
22 facts have not occurred within the forum of original selection and that forum has no
23 particular interest in the parties or the subject matter, the plaintiff's choice is only entitled to
24 minimal consideration.

25 *Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968). Progressive's business
26 contacts with California are not clear from the record.² Plaintiff's contact with the state of California
27 is based on the occurrence of the automobile accident in Santa Clara County, California. Compl. ¶
28 8. This action arose from Progressive's refusal to pay a claim based on alleged injuries caused in

² In her complaint, plaintiff alleged that Progressive conducts substantial business throughout the state of California and the county of Santa Clara, including the marketing and sale of insurance policies. Compl. ¶ 2. Progressive denied this allegation in its answer. Ans. ¶ 2.

1 that accident. Though the disputed claim was handled in Minnesota, Pothen Decl. ¶ 6, the dispute is
2 inextricably linked to the accident that occurred in California. Therefore, at least some of the
3 operative facts occurred in the plaintiff's chosen forum. Even so, California does not have a strong
4 interest in a breach of contract action brought by a Minnesota resident against a Wisconsin
5 corporation. Notice of Removal p. 2. Minnesota certainly has a greater interest in protecting the
6 rights of a Minnesota resident. Because plaintiff resides outside of the chosen forum and the chosen
7 forum lacks a significant interest in the action, plaintiff's choice of forum is given little weight.

8 **2. Availability of Compulsory Process**

9 Some of the witnesses that reside in Minnesota are nonparty witnesses and cannot be
10 compelled to testify in California. *See* Fed. R. Civ. Proc. 45(c)(3)(A)(ii). These include the medical
11 providers who treated plaintiff for her alleged injuries and the plaintiff's employer. If this action is
12 transferred to Minnesota, the parties would have subpoena power to secure the attendance of these
13 witnesses. On the other hand, if this action is transferred to Minnesota, the nonparty witnesses that
14 reside in California, such as Ms. O' Neal and other passengers in the car during the accident, could
15 not be compelled to testify in Minnesota. Maintaining this action in California would allow the
16 parties to secure the attendance of these California witnesses.

17 Since some nonparty witnesses are California residents while others are Minnesota residents,
18 it is inevitable that compulsory process will be unavailable for some witnesses, regardless of the
19 choice of forum. As with the convenience of witnesses factor, when taking into account the number
20 of witnesses affected and the relative importance of their testimony, the court finds that the ability to
21 compel attendance of nonparty witnesses weighs in favor of transfer.

22 **3. Ease of Access to Sources of Proof**

23 Progressive contends that all relevant records, including plaintiff's medical and employment
24 records, are located in Minnesota. Pothen Decl. ¶¶ 9-10. Plaintiff does not dispute this contention.
25 Thus, this factor weighs in favor of transfer.

26 **4. Location Where Agreement Was Executed**

27 Plaintiff's insurance policy was purchased and issued in Minnesota. Pothen Decl. ¶ 5. This
28 factors weighs in favor of transfer.

It is undisputed that Minnesota law governs the insurance policy at issue in this case. A district court in Minnesota would be more familiar with Minnesota law than a district court in California. This factor weighs in favor of transfer.

Progressive also asserts that plaintiff's breach of contract claim should have been pled as a compulsory counterclaim to an action it previously brought in the District of Minnesota. On February 10, 2009, Progressive filed a complaint for declaratory judgment in the United States District Court for the District of Minnesota ("Declaratory Judgment Action"). Notice of Pendency of Other Action. Progressive sought declaratory judgment that Minnesota law is applicable to determine coverage under the Progressive insurance policy issued to Zimpelman. *Id.* Progressive may be correct that plaintiff's breach of contract claim was a compulsory counterclaim in the Declaratory Judgment Action. If the Declaratory Judgment Action had continued, then dismissal of plaintiff's claim may have been appropriate. Under Fed. R. Civ. Proc. 13(f), the district court in the Declaratory Judgment Action could have permitted Zimpelman to amend her pleading to add the breach of contract counterclaim if "it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires." However, on November 24, 2009, the District of Minnesota dismissed the Declaratory Judgment Action without prejudice, based on Zimpelman and Progressive's stipulation of dismissal. Ex. A to Decl. of Fred G. Meis. In light of this dismissal without prejudice, there is no longer a basis for dismissing plaintiff's claims.

For the foregoing reasons, the court grants the motion to transfer venue to the District of Minnesota.

Ronald M. Whyte
 RONALD M. WHYTE
 United States District Judge

1 **Notice of this document has been electronically sent to:**

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7 Counsel are responsible for distributing copies of this document to co-counsel that have not
8 registered for e-filing under the court's CM/ECF program.

9
10 **Dated:** 1/8/10

CCL
11 **Chambers of Judge Whyte**